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Boston Gas Company ) D.T.E. 00-74

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**RESPONSE OF BOSTON GAS COMPANY TO THE ATTORNEY GENERAL'S  
MOTION TO SUSPEND FURTHER PROCEEDINGS PENDING COMPLIANCE  
WITH THE SUPREME JUDICIAL COURT'S REMAND ORDER**

**I. INTRODUCTION**

On September 15, 2000, Boston Gas Company ("Boston Gas" or the "Company") filed tariff schedules of proposed rates and charges in compliance with the performance-based ratemaking plan (the "PBR Plan") established by the Department of Telecommunications and Energy (the "Department") in Boston Gas Company, D.P.U. 96-50 (Phase I) (1996) ("D.P.U. 96-50"), as amended. Pursuant to the Department's determinations in D.P.U. 96-50 and related orders, the Company proposes new rate tariffs designed to increase the Company's 1999 normalized revenues by \$3,273,861 as of November 1, 2000.

On October 18, 2000, the Attorney General filed a "Motion To Suspend Further Proceedings Pending Compliance With The Supreme Judicial Court's Remand Order" (the "Motion"). As described below, the Attorney General made a similar request in response to last year's compliance filing by the Company. The Department denied the Attorney General's previous request and allowed the proposed rates to go into effect on the basis that the Company's filing complied with the requirements of the PBR plan, as modified by the Supreme Judicial Court (the "Court").<sup>(1)</sup> As set forth below, Boston Gas opposes the Attorney General's Motion for two reasons. First, the Department has already determined that the PBR Plan established in D.P.U. 96-50 and related orders, as modified by the Court, is valid and remains in effect until the Department concludes its remand proceeding. Second, the Department has discretion with regard to the conduct and timing of the remand proceeding and the exercise of this discretion has no impact on the validity of the PBR Plan, prior to the conclusion of the remand proceeding. Therefore, the Attorney General has raised no issue in relation to the Company's compliance filing that would provide a basis for the suspension or termination of the PBR Plan prior to the completion of the remand proceeding.

**II. PROCEDURAL HISTORY**

On November 30, 1996, the Department issued its initial determination in Boston Gas Company, D.P.U. 96-50, in which it approved a PBR Plan for the Company that would adjust base rates on an annual basis to reflect the impact of inflation less a productivity factor. D.P.U. 96-50, at 273-284. In its initial order, the Department established a productivity factor of 2.0 percent, which was composed of: (1) an input price growth index; (2) a productivity growth index; (3) a Consumer Dividend factor equal to 1.0 percent; and (4) an accumulated inefficiencies factor of 1.0 percent. *Id.* at 283. The Department subsequently reduced the Consumer Dividend factor to 0.5 percent. Boston Gas Company, D.P.U. 96-50-C at 58.<sup>(2)</sup> The Company appealed the inclusion of the accumulated inefficiencies factor by the Department to the Court, but disputed no other aspect of the productivity offset, nor any other component of the price-cap formula that is at issue in this proceeding.<sup>(3)</sup>

On August 13, 1999, the Court issued an order on the Company's appeal that vacated and remanded to the Department for further proceedings "those portions of the Department's Orders in DPU 96-50 and 96-50-C" that address the following two issues: (a) the inclusion of an accumulated inefficiencies factor in the Company's price-cap formula; and (b) the enlargement of the maximum contingent annual service-quality penalty. Boston Gas Co. v. Department of Pub. Utils., SJC-07970, at 1-2 (August 13, 1999). The Court issued its order upon consideration of the Department's Motion for Discharge of Report and Remand,<sup>(4)</sup> and the Company's response thereto, which acknowledged the continued operation of the Company's PBR Plan. Accordingly, the Company developed and filed rate tariffs for effect November 1, 1999, in compliance with the price-cap formula established by the Department in D.P.U. 96-50, as modified by the Court.

On October 27, 1999, the Attorney General filed a motion "To Suspend Proposed General Rate Increase Or In The Alternative, To Allow The Increase Subject To Refund" (the "Previous Motion"). The Attorney General requested that the Department suspend the tariffs pending further investigation, or in the alternative allow the rates to go into effect subject to refund, on the basis that the rates filed by the Company were not the product of the PBR formula approved by the Department in D.P.U. 96-50 and D.P.U. 96-50-C because of the absence of the accumulated inefficiencies factor (Previous Motion at 2).

On October 29, 2000, the Department issued an order finding that the Company must comply with the remainder of the price-cap formula, as well as the other provisions of D.P.U. 96-50 and 96-50-C, which were not vacated by the Court. The Department further found that the Company's filing complied with the requirements of the PBR plan, as modified by the Court. Accordingly, the Department denied the Attorney General's request for the suspension of the proposed rates and allowed the Company's proposed rates to go into effect as of November 1, 1999. Boston Gas Company, D.T.E. 99-85 (Third Annual PBR Compliance Filing), at 3 (1999).

### **III. ARGUMENT**

**A. The Attorney General's Request To Delay the Effectiveness of the Proposed Rates Established in the Compliance Filing Through the Suspension or Termination of the Company's PBR Plan Is Without Merit.**

In his Motion, the Attorney General requests that the Department suspend the proposed rates set forth in the Company's compliance filing until the Department "has established a record supporting its decision on the calculation of the productivity offset and all of its component parts" (Motion at 2). The Attorney General presents two options to the Department: (1) terminate the operation of the PBR Plan for Boston Gas; or (2) suspend the operation of the Plan until such time as a productivity offset has been re-established through the remand proceeding (*id.* at 3). As discussed below, the Department has already considered and ruled on this requested relief in relation to last year's compliance filing. Accordingly, the Department should once again deny the Attorney General's Motion.

In his Previous Motion, the Attorney General requested that the Department suspend the proposed rate tariffs pending further investigation of the accumulated inefficiencies factor. As indicated by the Company in response to the Attorney General's Previous Motion, the Court vacated that portion of the Department's orders that relates to only a single adjustment to the price-cap formula (*i.e.*, accumulated inefficiencies), and therefore, the Company is bound to comply with the remainder of the price-cap formula established by the Department, as well as other provisions of the D.P.U. 96-50 not vacated by the Court. Boston Gas, D.T.E. 99-85, at 3. In ruling on the Attorney General's Previous Motion, the Department found that, "[u]ntil the Department concludes a proceeding on remand, the Company has correctly declined to include any recognition of accumulated inefficiencies in its current compliance filing." *Id.* The Department also determined that, until the remand proceeding is concluded, the Company must comply with the remainder of the price-cap formula, as well as the other provisions of D.P.U. 96-50 and 96-50-C, not vacated by the Court. *Id.*

Accordingly, the Department's order in D.P.U. 96-50, as amended by the Court's action to vacate discrete portions, remains in effect, and the Company's compliance filing must be judged solely on whether it complies with the PBR Plan as approved by the Department and as further modified by Court order. *Id.* Therefore, to the extent that the Company's calculations are accurate and reflect all legally enforceable price-cap formula components embodied in the PBR Plan, the Department's unilateral suspension or termination of the PBR Plan would infringe upon the Company's due process rights.

Although framed somewhat differently from his Previous Motion, the Attorney General's requested relief would effectively require the Department to reconsider its previous determination on the issue.<sup>(5)</sup> Aside from being untimely, the Attorney General, has offered no new rationale or basis upon which the Department could rest a decision to suspend the effective date of the proposed tariffs where: (1) the PBR Plan remains valid and effective consistent with a prior Department order, as modified by the Court; and (2) the Company's proposed rates are determined to comply with the requirements of the PBR Plan. Accordingly, the Attorney General's Motion to suspend or terminate the

operation of the PBR Plan pending the outcome of the remand proceeding is without merit and should be denied.

### **B. The Department's Discretion Regarding the Conduct of the Remand Proceedings Has No Impact on the Validity of the PBR Plan.**

Unless a court specifically directs otherwise, administrative agencies have considerable discretion in determining the conduct and timing of remand proceedings. See, e.g., Point of Pines Beach Assoc. v. Energy Facilities Siting Board, 419 Mass. 281, 287 (1995); Federman v. Board of Appeals of Marblehead, 35 Mass. App. Ct. 727, 729 (1994); Amherst-Pelham Reg'l Sch. Comm. v. Department of Educ., 376 Mass. 480, 496 (1978). In this case, the Court has not directed the Department to take any specific action with respect to the remand proceeding. Moreover, because the PBR Plan is the result of a valid and enforceable Department order (as modified by the Court), the Department's exercise of discretion with regard to the conduct of the remand proceeding does not, and cannot, affect the validity of the PBR Plan prior to the conclusion of the remand proceeding.

For example, it is within an agency's discretion to determine the scope of the remand proceeding as far as the need for additional evidentiary hearings to ameliorate the deficiencies of the underlying agency decision. Thus, when the remanding court vacates the decision of an agency and does not specifically order an agency to reopen the record, the agency may determine whether to proceed on the basis of evidence presented at the earlier hearing or to rehear the case regarding the specific issue remanded. See, e.g., Point of Pines, 419 Mass. at 287 ("We leave any question concerning a reopening of the board's hearings to the discretion of the board"); Attorney Gen. v. Energy Facilities Siting Board, 419 Mass. 1003, 1005 (1995); Holyoke St. Ry. Co. v. Department of Pub. Utils., 347 Mass. 440, 450 (1964); Adams v. Contributory Retirement Appeal Bd., 33 Mass. App. Ct. 171, 175 (1992) (stating that, on remand, the agency "chose not to hold further hearings (nor was it required so to do)"), *rev'd on other grounds*, 414 Mass. 360, 364, n.4 (1993); Lion Distributors, Inc. v. Alcoholic Beverages Control Comm'n, 15 Mass. App. Ct. 988, 990 (1983) ("In its discretion, the commission may proceed on the basis of the evidence presented at the earlier hearing, or it may rehear the case insofar as a violation of [a specific statutory provision] is alleged"); Sniffin v. Prudential Ins. Co. of America, 11 Mass. App. Ct. 714, 722 (1981).

Notwithstanding administrative law concepts to the contrary, the Attorney General implies that the Department is obligated to reopen the record and conduct additional evidentiary hearings (Motion at 2). In the case cited by the Attorney General, however, the Court vacated the Department's decision and specifically ordered the Department to reopen the record so that the Department could consider new evidence regarding the subject of the remand. Boston Edison Co. v. Department of Pub. Utils., 419 Mass. 738, 749 (1995). The Court has not so directed the Department in this case. In this case, the Court vacated the Department's order and generally remanded the issue of accumulated inefficiencies to the Department. Boston Gas Co. v. Department of Pub. Utils., SJC-07970, at 1-2 (August 13, 1999). Therefore, the Department retains its full discretion to determine whether a reopening of the record is necessary or warranted.<sup>(6)</sup> See, e.g., Point

of Pines, 419 Mass. at 287; Attorney Gen. v. Energy Facilities Siting Board, 419 Mass. at 1005; Holyoke St. Ry. Co., 347 Mass. at 450; Adams, 33 Mass. App. Ct. at 175 (1992); Lion Distributors, 15 Mass. App. Ct. at 990; Sniffin, 11 Mass. App. Ct. at 722.

Further, an administrative agency has the discretion to determine the time frame in which it will act. See Amherst-Pelham, 376 Mass. at 496; Cheney v. Coughlin, 201 Mass. 204, 211 (1909). Even where an applicable statute imposes a mandatory time for performance of some agency action, the Court has found that the lapse of such a time frame does not affect the validity of an agency's actions, but instead only goes to the orderly conduct of an agency's business. Amherst-Pelham, 376 Mass. at 496; Cheney, 201 Mass. at 211. The Court has stated:

Even as to a statute imperative in phrase, it has often been held that where it relates only to the time of performance of a duty by a public officer and does not go to the essence of the thing to be done, it is only a regulation for the orderly and convenient conduct of public business and not a condition precedent to the validity of the act done.

Cheney, 201 Mass. at 211. Furthermore, to the extent that an agency may impose a time frame upon itself by regulation, the agency retains discretion to waive the application of its own regulations, and therefore, a time limitation so established is not mandatory. See Amherst-Pelham, 376 Mass. at 480. Accordingly, the Department has discretion to establish a reasonable time frame for the conduct of the remand proceeding since there are no statutory, regulatory or judicially imposed time limits that direct otherwise and, even if there were, the Department would ultimately retain the discretion to determine the time frame in which it will act.

The Department also is not required to adhere to the outcome of its previous decision. In his Motion, the Attorney General implies that customers are being harmed because, under the Department's "original" order, Boston Gas would have proposed a rate increase of approximately \$620,000 rather than the \$3,273,861 included in its September 15, 2000 compliance filing (Motion at 2). This presupposes that the Department would reinstate the accumulated inefficiencies factor at the level established in D.P.U. 96-50 and that the remand proceeding would merely be a formality. In view of the fact that the Department voluntarily requested the remand of this issue (for lack of evidentiary support and associated subsidiary findings), such a conclusion is not warranted.

Thus, the Attorney General's statement that the "clear impact" of allowing the PBR Plan to operate pending the remand proceeding is that the proposed rate increase equals \$3.2 million instead of \$620,000 and that, as a result, consumers face a "five-fold" increase is misleading, at best. The Company is currently operating under a PBR Plan that is the product of a valid and enforceable Department order, and by definition, the rates produced by the PBR Plan are just and reasonable. In conducting the remand proceeding, the Department is not bound to a particular outcome and unless and until the Department determines that the PBR Plan should be modified, rates must be established in compliance with the PBR Plan.

#### **IV. CONCLUSION**

The Department should deny the Attorney General's Motion for two reasons: (1) the Department has already determined that the PBR Plan established in D.P.U. 96-50 and related orders, as modified by the Court, is valid and must remain in effect until the Department concludes its remand proceeding; and (2) the Department has discretion with regard to the scope and timing of the remand proceeding and the exercise of this discretion has no impact on the validity of the PBR Plan prior to the conclusion of the remand proceeding. The Attorney General has raised no issue in relation to the Company's compliance filing that would provide a basis for the suspension or termination of the PBR Plan prior to the completion of the remand proceeding. Therefore, the Attorney General's Motion requesting that the Department suspend the operation of the PBR Plan for Boston Gas, or in the alternative, suspend the operation of the Plan until the remand proceeding is conducted, should be denied.

Respectfully submitted,

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By their attorneys,

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1.

<sup>1</sup> The Court's remand and its effect on the Boston Gas PBR plan is detailed below.

2.

<sup>1</sup> The result, including the amended Consumer Dividend, is calculated as:

$$X = (TFP_{(NEgas)} - TFP_{(US)}) - (IP_{(NEgas)} - IP_{(US)}) + CD + \text{accumulated inefficiencies}$$

$$X = (0.4 - 0.3) - (3.7 - 3.6) + 0.5 + 1.0 = 1.5.$$

See D.P.U. 96-50, at 284 n.130.

3.

<sup>2</sup> The Company also appealed the enlargement of the maximum contingent annual service quality adjustment that it could be required to pay from \$1.0 million to \$4.9 million. Boston Gas Company v. Department of Public Utilities, SJC-97-0323, Petition for Appeal at 8-9 (filed June 5, 1997). Because the Company did not miss any of the service-quality metrics, the issue of the size of the penalties is not material to this filing.

4.

<sup>1</sup> The Department was represented before the Court by the Attorney General throughout the proceeding.

5.

<sup>1</sup> A motion for reconsideration should bring to light previously unknown or undisclosed facts that would have a significant impact upon the decision already rendered. Commonwealth Electric Company, D.P.U. 92-3C-1A at 3-6 (1995); Boston Edison Company, D.P.U. 90-270-A at 3. Alternatively, a motion for reconsideration may be based on the argument that the Department's treatment of an issue was the result of mistake or inadvertence. Massachusetts Electric Company, D.P.U. 90-261-B at 7 (1991); New England

Telephone and Telegraph Company, D.P.U. 86-33-J at 2 (1989). Even if the Attorney General's request for reconsideration was timely, which it is not, the Attorney General has not articulated any extraordinary circumstances, previously unknown information or Department error that would warrant reconsideration of the Department's ruling on the Previous Motion.

6.

<sup>1</sup> There are various proceedings that the Department could conduct on the issue of accumulated inefficiencies without re-opening the record to new evidence. For example, the Department could request additional argument or briefing from the parties on the specific issues of the remand. Or the Department could revisit its previous ruling and issue a decision based on its reconsideration.